

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRO TECH CORP.,	:	
STEFAN BRODIE and	:	
DON BRODIE,	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 00-2160
v.	:	
	:	
EUROPEAN BANK FOR	:	
RECONSTRUCTION AND	:	
DEVELOPMENT, and, OVERSEAS	:	
PRIVATE INVESTMENT	:	
CORPORATION,	:	
Defendants.	:	

GREEN, S.J.

NOVEMBER _____, 2000

MEMORANDUM-ORDER

Presently before the Court is Defendant Overseas Private Investment Corporation's Motion to Dismiss Plaintiffs' Complaint, Plaintiffs' Response, and the respective parties' additional replies. For the following reasons, Defendant's motion will be granted pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and Plaintiffs' Complaint against this Defendant will be dismissed.¹

¹ Defendant has also moved to have Plaintiffs' Complaint dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6), or, in the alternative, for summary judgment under Rule 56. Defendant argues that the OPIC is immune under sovereign immunity, except to the extent sovereign immunity has been waived by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"). Along with this argument, Defendant argues that, if a claim is excepted from the FTCA, then the dictates of sovereign immunity still apply; specifically, Defendant argues that the "contract exception" and "discretionary function exception" apply to the case at bar. **See The OPIC's Memorandum in Support of the Motion to Dismiss** at 10; 14. I agree that if Plaintiffs' claims were based on interference with contract, or questioned the OPIC's discretionary actions, the claims would have to be dismissed. However, I need not delve into these exceptions at this point, because Plaintiffs have pled, briefed and orally argued that their claims against the OPIC are based on state law, and are

I. Factual and Procedural Background

Plaintiffs' make the following allegations:

After the fall of the Berlin Wall, Europe bristled with the hope that the previously restricted markets of Eastern Europe would be open to investments from the West.² To capitalize on this opportunity, the Plaintiffs had one of their subsidiaries join with a Romanian-owned corporation and the European Bank for Reconstruction and Development ("EBRD") to create a joint venture for the purpose of manufacturing ion exchange materials at a complex in Romania. The ultimate venture formed was Virolite Functional Polymers S.A. ("Virolite"). The EBRD was responsible for providing a substantial amount of the monetary basis for the venture. Due to the size of the loan made by the EBRD, the EBRD asked the other parties if a portion of the loan could be participated out; all parties agreed to this arrangement, conditioned on the understanding that the entire loan was to be treated as a single loan, with the participant acting as an alter ego of the EBRD. The Overseas Private Investment Corporation ("OPIC") was chosen as the participant, and the EBRD participated \$5 million of the loan to the OPIC. The OPIC is an federal agency of the United States, and it is "charged with encouraging private investment in developing countries." See The OPIC's Memorandum in Support of the Motion to Dismiss at 1.

All parties knew that their investments in Virolite were highly speculative, due to the turbulent nature of the newly developing market-economies. With their worst fears being

tortious in nature. Therefore, it is proper for the first review of their tort claims to occur through the appropriate administrative procedures.

² All facts have been taken from Plaintiffs' Complaint, unless noted otherwise.

realized, Romania's economic landscape faltered, and Virolite was pushed to the brink of insolvency. At this point, the various parties jostled to protect their investments. In 1999, the Plaintiffs attempted to re-finance the venture, trying to keep the organization solvent, with the hopes that a further infusion of capital would enable the company to continue in expectation that economic conditions would change. The Plaintiffs allege that the EBRD, with the assistance of the OPIC, thwarted their efforts to re-finance the burdensome loans. Due to their refusal to re-finance, the condition of Virolite continued to worsen, and Virolite edged closer to the brink of bankruptcy. In fact, both the EBRD and the OPIC initiated insolvency procedures against Virolite in Romania.

The Plaintiffs argue that the OPIC has conspired with the EBRD to breach the EBRD's duty towards Plaintiffs, and to keep the Plaintiffs from restructuring the loan. Because of the OPIC's obstinacy in restructuring the loan, and their efforts to foreclose on Virolite, the Plaintiffs risk the loss of their \$1.8 million cash investment.

Unable to amicably resolve their differences, the instant action was instituted. Plaintiffs filed their Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania, on April 6, 2000. On April 26, 2000, the OPIC filed a timely notice of removal to this Court, pursuant to 28 U.S.C. § 1446(b). This action was removable pursuant to 28 U.S.C. § 1442 because the OPIC is an agency of the United States.

The Plaintiffs' six count Complaint against the EBRD and the OPIC was based on several legal theories. Counts I-IV were levied solely against the EBRD, while Count V was levied against both the EBRD and the OPIC, and Count VI was levied solely against the OPIC. Count I alleged breach of joint venturer's fiduciary duty; Count II alleged fraudulent misrepresentation

and concealment; Count III alleged negligent misrepresentation and concealment; Count IV, tortious interference; Count V, alleged conspiracy against the EBRD and the OPIC; and, Count VI alleged aiding and abetting solely against the OPIC.

The OPIC filed a Motion to Dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Plaintiffs filed a response, each party filed additional replies, and the Court held a hearing for further explication and discussion of the sundry issues.

II. Discussion

It is well-established that “federal courts are courts of limited jurisdiction.” Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Questions of sovereign immunity are jurisdictional in nature. See F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). It is the Plaintiffs’ burden to prove subject matter jurisdiction. See Gibbs v. Buck, 307 U.S. 66, 72 (1939); Mortensen v. First Federal Savings & Loan Ass’n., 549 F.2d 884 (3d Cir. 1977). It should be noted, too, that a review of the Court’s subject matter jurisdiction under Rule 12(b)(1) is significantly different than a review under either Rule 12(b)(6) or Rule 56. In a Rule 12(b)(1) motion such as the one at bar, Defendant questions the existence of subject matter jurisdiction in fact, and there is, therefore, no presumptive truthfulness attached to the Plaintiffs’ allegations. See Mortensen, 549 F.2d at 891. “Accordingly, unlike a Rule 12(b)(6) motion, consideration of a Rule 12(b)(1) jurisdiction-type motion need not be limited; conflicting written and oral evidence may be considered and a court may ‘decide for itself the factual issues which determine jurisdiction.’” Biase v. Kaplan, 852 F. Supp. 268, 277 (D.N.J. 1994) (*quoting Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897, (1981)).

The OPIC is “an agency of the United States under the policy guidance of the Secretary of State.” 22 U.S.C. § 2191. “Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). Claims against federal agencies are controlled by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (“FTCA”). Claims against the OPIC are cognizable under the FTCA if they are:

[1] against the United states, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). “The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.” McNeil v. U.S., 508 U.S. 106, 113 (1993).

The Plaintiffs requested both money damages and injunctive relief against the OPIC. The prayer for money damages is based on the risk to the Plaintiffs’ investment, due to the OPIC’s actions. The prayer for injunctive relief is premised on the OPIC’s now discontinued prosecution of insolvency proceedings against Virolite.

A. Money Damages

All of Plaintiffs’ claims for money damages are controlled by the FTCA. Plaintiffs admit in their sur-reply brief that they have not exhausted their administrative remedies, having just filed their administrative action in October, 2000. See Plaintiffs’ Sur-Reply to the OPIC’s Motion to Dismiss at 2. Therefore, under McNeil, it is mandatory that Plaintiffs’ claims be

dismissed.

B. Injunctive Relief

The Plaintiffs also request that the OPIC be enjoined from prosecuting an insolvency claim against Virolite, and from any future action which would impair Plaintiffs rights in Virolite. Insofar as Plaintiffs ask for an injunction against the OPIC requiring the OPIC to cease their insolvency proceedings, the request is moot, because the insolvency actions have been dismissed by the Romanian bankruptcy judge. See Plaintiffs' Sur-Reply to the OPIC's Motion to Dismiss at 1-2, Exh. A.

The Plaintiffs' second claim for injunctive relief asks the Court to prospectively enjoin the OPIC from conspiring with the EBRD to violate the Plaintiffs' rights. See Compl. at pg. 28. However, the Court cannot possibly enjoin the OPIC based upon such a vague request. In their Complaint, their briefs and their oral arguments, the Plaintiffs have not been able to spell out any imminent conduct of the OPIC which would entitle the Plaintiffs to injunctive relief. Without particular examples of conduct, it is impossible to determine whether an injunction would be appropriate, considering the threshold requirements for the imposition of an injunction, and considering the particular reviews which are implicated due to the involvement of a federal agency. Therefore, all of Plaintiffs' requests for injunctive relief must be dismissed.

III. Conclusion

Plaintiffs' claims for money damages will be dismissed without prejudice. All of Plaintiffs' claims for injunctive relief will be dismissed with prejudice, as to alleged conduct to date. An appropriate order follows: